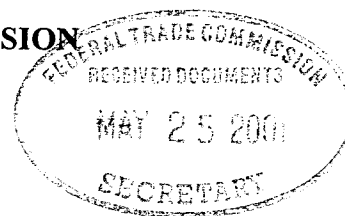


UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of

SCHERING-PLOUGH CORPORATION,
a corporation,

UPSHER-SMITH LABORATORIES, INC.
a corporation,

and

AMERICAN HOME PRODUCTS
CORPORATION,

a corporation.

Docket No. 9297

COMPLAINT COUNSEL'S MOTION TO AMEND
PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL
(PUBLIC RECORD)

Complaint counsel respectfully requests that Your Honor amend Paragraph 5 of the Terms and Conditions of The Protective Order Governing Discovery Material, entered in this matter on May 10, 2001, to remove Mark Robbins as a designated individual, on behalf of Upsher-Smith, to be provided with access to Confidential Discovery Material. We are filing this motion to address the concerns that complaint counsel, as well as a third party, have about Mr. Robbins gaining access to highly sensitive commercial documents produced by third parties.

The Protective Order precluded in-house counsel with day to day business responsibilities from having access to Confidential Discovery Material. (.....
.....

.....)¹ (Mr. Robbins is Vice President of Scientific Affairs,
not Director of Scientific Affairs, as listed in The Protective Order.)(.....

.....) These functions
are day to day business responsibilities within the meaning of The Protective Order. (.....

.....

.....

.....

.....)²

(.....

.....

.....

.....

.....

.....)

Legal Standard

The standard for determining if in-house counsel is given access to confidential material
is whether the official was involved in “competitive decisionmaking”. *Matsushita Electrical*

¹ (.....
.....
.....)

² (.....
.....
.....)

Indus. Co. v. United States, 929 F.2d 1577, 1580 (Fed. Cir. 1991). In *U.S. Steel Corp. v. United States*, the Court ruled that access to confidential information cannot be denied to counsel solely because of his or her status as in-house counsel; instead, this determination is made on a case-by-case basis, analyzing the counsel's activities and relationship with the party. 730 F.2d 1465. 1468 (Fed. Cir. 1984). If the counsel gives advice and participates in the party's competitive business decisions, he or she is precluded from viewing confidential material. *See, e.g., Matsushita*, 929 F.2d at 1579 (quoting *U.S. Steel Corp.*, 730 F.2d at 1468). In *Matsushita*, the in-house counsel was given access to confidential documents by the Court because he was insulated from what is described as "competitive decisionmaking". *Id.* at 1579. "Competitive decisionmaking" involves giving advice and participating in a company's decisions "made in light of similar or corresponding information about a competitor." *Id.* This includes decisions concerning pricing and product design. *Id.* In his capacity as Upsher-Smith's Vice President of Scientific Affairs, Mr. Robbins makes competitive decisions on product design and development. Therefore, Mr. Robbins should not have access to Confidential Discovery Materials.

Concerns of Third Party

Counsel for a third party expressed strong concern about Mr. Robbins having access to his client's research and development materials because of Mr. Robbins' authority over research and development at a major competitor. The Protective Order, as it now stands, may hamper future voluntary cooperation with the Commission on the part of third parties concerned about rivals having access to their trade secrets and commercial information.

Conclusion

Since Mr. Robbins has day to day business responsibilities and should be denied access to Confidential Discovery Material, we respectfully request that Paragraph 5 of the Terms and Conditions of The Protective Order Governing Discovery Material, entered in this matter on May 10, 2001, be amended to remove Mr. Robbins as a designated individual. We have discussed this issue with counsel for Upsher-Smith but appear to be at an impasse.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Karen Bokar", written over a horizontal line.

Karen Bokar

Steve Vieux

Counsel Supporting the Complaint

Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

Dated: May 25, 2001

CERTIFICATE OF SERVICE

I, Steve Vieux, hereby certify that on May 25, 2001, I caused a copy of the public version of Complaint Counsel's Motion To Amend Protective Order Governing Discovery Material to be served upon the following persons by hand delivery and facsimile (without attachments).

The Honorable D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Cathy Hoffman, Esquire
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206

Laura Shores, Esquire
Howrey Simon Arnold & White
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2402

Christopher M. Curran, Esquire
White & Case LLP
601 13th Street, N.W.
Washington, D.C. 20005


Steve Vieux